

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 21, 2015**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2014AP1133-CR**

**Cir. Ct. No. 2010CF67**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**DAVID A. KING,**

**DEFENDANT-APPELLANT.**

---

APPEAL from an order of the circuit court for Lincoln County:  
ROBERT RUSSELL, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. David King appeals an order denying his motion to reduce his sentence by vacating the portion of the sentence attributable to the repeater enhancement. He argues: (1) the court failed to make a finding that he was a repeat offender; (2) the presentence investigation report (PSI) was not

adequate to prove his repeater status because it lacked sufficient specificity necessary to constitute a reliable government report; (3) the PSI lacked specificity regarding the dates of prior conviction and incarceration; and (4) King was denied his due process right to challenge the evidence of his repeater status. We reject these arguments and affirm the order.

¶2 The complaint filed March 1, 2010 charged King with three offenses as a party to a crime and as a repeater. The date of the alleged offenses was July 4, 2007. The complaint listed numerous prior convictions by offense, date of conviction, and case number and county; it showed ten criminal convictions in the five years preceding July 4, 2007. A jury convicted King of all three counts.

¶3 The PSI also noted King was charged as a repeater in all three counts. It detailed the date of prior offenses, type of offense, the county and disposition. At the sentencing hearing, King's counsel challenged one of the entries, correcting an entry of robbery with use of force and substantial battery to two convictions for substantial battery. Counsel confirmed that all other convictions were described accurately. The court alluded to King's extensive record, including a 2005 conviction for burglary, and imposed concurrent sentences totaling fifteen years' imprisonment.

¶4 Under WIS. STAT. § 939.62(2) (2011-12),<sup>1</sup> a person is a repeater if he or she was convicted of one felony or three misdemeanors during the five-year period immediately preceding the commission of the crime for which he or she is now being sentenced. WISCONSIN STAT. § 973.12(1) requires the State to allege

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the predicate convictions within the applicable charging document before acceptance of any plea. A repeater allegation should identify the repeater offense, the date of conviction for that offense, and whether the offense was a felony or a misdemeanor. *State v. Stynes*, 2003 WI 65, ¶¶14-15, 262 Wis. 2d 335, 665 N.W.2d 115. The date of conviction is relevant because the ability to use a conviction to establish repeater status depends on whether the conviction falls within the five-year period identified in § 939.62(2). *Id.*, ¶15.

¶5 The court implicitly found that King was a repeater. An implicit finding of fact is sufficient when the facts of record support the decision of the trial court. *State v. Echols*, 175 Wis. 2d 653, 672, 499 N.W.2d 631 (1993). The court described King's extensive criminal history and listed his prior offenses, specifically focusing on the 2005 conviction for burglary, a felony. The PSI noted King was charged as a repeater on all three counts and listed his many predicate offenses. Contrary to King's argument, the State mentioned his repeater status three times at the sentencing hearing and recommended sentences longer than the maximum unenhanced sentences. Under the circumstances, the court implicitly found that King qualified as a repeat offender. The court was not required to recite magic words to set forth its findings of fact. *Id.*

¶6 The PSI established King's status as a repeat offender. Under WIS. STAT. § 973.12(1), an official report of a governmental agency constitutes prima facie evidence of a conviction or sentence. *State v. Bonds*, 2006 WI 83, ¶36, 292 Wis. 2d 344, 717 N.W.2d 133. The PSI constitutes sufficient evidence to satisfy the State's burden of proof if it bears sufficient indicia of reliability, such as independent verification of the information rather than reliance on the complaint, or if it includes information not contained in the complaint. *See State v. Caldwell*, 154 Wis. 2d 683, 693-95, 454 N.W.2d 13 (Ct. App. 1990). Here, the PSI contains

information not included in the criminal complaint about the disposition of cases, including the sentences or probationary terms imposed and whether supervision was revoked.

¶7 King contends the PSA was inadequate because it does not show the dates of conviction and the dates of incarceration for the prior offenses. The first column of the PSI chart lists dates, but has no heading indicating what occurred on those dates. King suggests those dates could refer to the date the crimes were committed rather than the dates of convictions. Even if that were so, the convictions necessarily occurred after the crimes were committed. It is not speculative to conclude the date of the 2005 felony burglary conviction occurred within the five years preceding the present 2007 offenses. King contends the PSI was inadequate because it does not show the dates of incarceration. The time a prisoner is incarcerated is relevant only if the predicate offense or offenses occurred more than five years before the current crime because time spent in custody is not considered when calculating the five years. WIS. STAT. § 939.62(2). Therefore, the PSI was prima facie evidence of King's convictions and sentences despite the absence of any mention of the time he spent in custody on those offenses.

¶8 Finally, King had adequate notice and opportunity to be heard on the question of whether he was a repeat offender. When repeater allegations are contained in the complaint, a defendant has sufficient notice to satisfy due process considerations. *Caldwell*, 154 Wis. 2d at 693. At his initial appearance, King personally acknowledged receiving the criminal complaint. King also received the PSI which describes the offenses, including the repeater allegations. At the sentencing hearing, when asked whether there were any corrections to the PSI, his

attorney corrected one entry and confirmed all other convictions were described accurately.

*By the Court.*—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

